SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

January Term, 1974
No. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

BRIEF OF RESPONDENT

Office and Post Office Address:
2200 One Washington Plaza
Tacoma, Washington 98402

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON, O'HERN & JOHNSON

E. M. MURRAY
DALE L. CARLISLE
DENNIS S. HARLOWE
Attorneys for Respondent

CRAFTSMAN ◆ NET PRESS ◆ SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
Statement of the Case	1
(a) Nature of the Case, Court Proceedings and Disposition in the Courts Below	1
(b) Statement of Facts Relevant to the Issues, With References to the Record	3
Argument	8
Cerpac As Subcontractor	8
(a) Subcontractor Status Not Necessary	8
(b) Cerpac Was a Subcontractor	11
If Required, Notice Was Timely	13
Venue Was Proper	15
Interest Was Properly Awarded After Revision on Appeal	17
Attorneys' Fees Were Properly Awarded	18
Conclusion	23

TABLES OF AUTHORITY

Table of Cases

Aetna Cas. & Sur. Co. v. U.S. ex rel. Gibson Steel Co., 382 F.2d 615 (5th Cir. 1967)	12
Aetna Casualty and Security Co. v. U.S. ex rel. R. Studer & Sons, 365 F.2d (8th Cir. 1966)	18
Atlantic Electric, Inc. v. Allis-Chalmers Manufacturing Co., 375 F.2d 726 (5th Cir. 1967)	13
B. C. Richter Constr. Co. v. Continental Cas. Co., 230 Cal. App. 2d 491, 41 Cal. Rptr. 98 (1964)	20
Basich Brothers Construction Company v. United States, 159 F.2d 182 (9th Cir. 1946)	11, 12

Page

D&L Constr. Co. v. Triangle Electric Supply Co., 322 F.2d 1009 (8th Cir. 1964) 22

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 19

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527 (5th Cir. 1946) 16

Illinois Sur. Co. v. The John Davis Co., 244 U.S. 376 (1917) 19, 21, 22

L&E Co. v. U.S. ex rel. Kaiser Gypsum, 351 F.2d 880 (9th Cir. 1965) 17

MacEvoy v. U.S. ex rel. Calvin Tomkins Co., 322 U.S. 102 (1943) 8, 11, 12, 13

McDonald v. Thomson, 184 U.S. 71 (1902) 9

Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175, 53 L. Ed. 753 (1909) 17

T. F. Scholes, Inc. v. U.S. ex rel. Moore Equipment Co., 295 F.2d 366 (10th Cir. 1961) 15

Transamerica Insurance Company v. Red Top Metal, Inc., 834 F.2d 752 (5th Cir. 1967) 21, 22

Traveler's Indemnity Co. v. U.S. ex rel. Western Steel Co., 362 F.2d 896 (9th Cir. 1966) 12

United States Fidelity & Guaranty Co. v. Hendry Corp., 391 F.2d 13 (5th Cir. 1968) *cert. denied*, 383 U.S. 978, 21 L. Ed. 2d 439 22

U.S. ex rel. Austin v. Western Electric Co., 337 F.2d 568 (9th Cir. 1964) 14

U.S. ex rel. Bartells Company v. Hoffman Construction Co., 163 F. Supp. 296 (E.D. Wash. 1958) 22

U.S. ex rel. Bryant v. Lembke Construction Co., 370 F.2d 293 (10th Cir. 1966) 11, 12

U.S. ex rel. Capolino Sons, Inc. v. Electronic and Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966) *cert. dismissed*, 385 U.S. 924 16

Page

U.S. ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, 293 F.2d 816 (9th Cir. 1961) *cert. denied*, 386 U.S. 987 ..... 15, 17

U.S. ex rel. Chevron Asphalt Co. v. Maryland Casualty Company, 316 F. Supp. 750 (E.D. Cal. 1970) 20

U.S. ex rel. Dixie Plumbing Supply Co. v. Taylor, 293 F.2d 717 (5th Cir. 1961) 22

U.S. ex rel. Foley & Bro. Inc. v. U.S. Fidelity & Guaranty Co., 113 F.2d 888 (2d Cir. 1940) 8-9

U.S. ex rel. General Electric Co. v. Gunnar I. Johnson, Inc., 310 F.2d 899 (8th Cir. 1962) 14

U.S. ex rel. General Electric v. Hershon Co., 52 F. Supp. 832 (D.C. N.Y. 1943) 14-15

U.S. ex rel. Getz Bros. & Co. v. Markowitz Bros. (Delaware) Inc., 383 F.2d 595 (9th Cir. 1967) 21

U.S. ex rel. Hargis v. Maryland Casualty Co., 64 F. Supp. 522 (D.C. Cal. 1946) 9

U.S. ex rel. Industrial Lumber Co. v. Rich, 473 F.2d 720 (9th Cir. 1973) 11-12

U.S. ex rel. Munroe v. Praught, 270 F.2d 235 (1st Cir. 1959) 15

U.S. ex rel. Noland v. Andrews, 406 F.2d 790 (4th Cir. 1969) 14

U.S. ex rel. Pritchard Products Corp v. Fullerton Constr. Co., 407 F.2d 1002 (4th Cir. 1969) 22

U.S. ex rel. Sanford v. Continental Casualty Co., 293 F. Supp.816 (D.C. Miss. 1968) 22

U.S. ex rel. Walker & Co. v. Home Indemnity Co., 346 F. Supp. (D.C. Tex. 1972) 21

U.S. ex rel. Wellman Engineering Co. v. M.S.I Corp., 350 F.2d 285 (2d Cir. 1965) 12

Statutes

	Page
California Civil Code § 3287	17
§ 3287(b)	18
§ 3289	18
California Government Code § 4207	20
15 U.S.C. § 1117 (Lanham Act)	19
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1
28 U.S.C. § 1332	1
40 U.S.C. § 270a, *et seq.* (Miller Act)	1, 4
40 U.S.C. § 270a(a)(2)	19
40 U.S.C. § 270b(a)	8, 19
40 U.S.C. § 270b(b)	16

Textbooks

Wright, *Federal Courts* 19 (1963)	17

Other Authority

Fed. R. Civ. P. 42(a)	16-17
Fed. R. Civ. P. 52(a)	9

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ON PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

(a) Nature of the Case, Court Proceedings and Disposition in the Courts Below

This case arises out of the sale of building materials for construction of federal government housing at Beale Air Force Base near Marysville, California. The District Court had jurisdiction based on diversity of citizenship, 28 U.S.C. Sec. 1332, and under the Miller Act, 40 U.S.C. 270a, et. seq.; the Court of Appeals had appellate jurisdiction under 28 U.S.C. Sec. 1291. This Court has jurisdiction for review on certiorari under 28 U.S.C. 1254(1).

Following the trial, the District Court awarded Respondent, Industrial Lumber Co., Inc. ("Industrial"), judgment for the full amount of the unpaid balance due on its contract to furnish all exterior plywood for the federal housing project, together with interest on an "unliquidated" claim at the rate of seven percent (7%) per annum. While the District Court found that a reasonable and necessary attorneys' fee would be twenty-five percent (25%) of the principal and interest recovered, attorneys' fees were not awarded. Two of the original defendants, Petitioners F. D. Rich Co. ("Rich"), the prime contractor, and Transamerica Insurance Company ("Transamerica"), the surety with Miller Act payment bond coverage on the project, appealed the judgment, challenging the status of a third defendant, Cerpac, Inc. ("Cerpac") as a subcontractor, the timeliness of notice under the Miller Act, and the venue of the case on one portion of Industrial's claim. Industrial cross-appealed to increase the amount of interest allowed to that permissible on a "liquidated" claim, and to recover attorneys' fees in the amount found reasonable by the District Court but not awarded.

On Appeal, the District Court was sustained as to the status of Cerpac as a subcontractor and the timeliness of notice. The District Court judgment was modified so as to exclude Transamerica from liability for the amount of two shipments diverted by Rich from the project at Beale Air Force Base for use on another government construction site in South Carolina. On Cross-Appeal, Industrial was awarded interest for a liquidated claim at the increased rate of eight percent (8%) per annum from the date payment was due, and the case was remanded to the District Court for further consideration of an award of attorneys'

fees in light of the appellate decision that such fees were definitely to be awarded. On remand, the District Court entered judgment, modified as to Transamerica, with interest at the increased rate and attorneys' fees amounting to twenty-five percent (25%) of Industrial's recovery, together with an increment of $3,500.00 for attorneys' fees through the appeal. Petitioner's motion for stay of execution pending application to this Court for certiorari was denied by the District Court and judgment entered accordingly on April 16, 1973. Upon receiving payment from Rich, Industrial satisfied the judgment of record.

(b) Statement of Facts Relevant to the Issues, With References to the Record*

Between 1961 and 1968, Rich built a considerable number of federal housing projects throughout the United States and its possessions. (Rich 4, 12; T15-16, R127) During the period between 1963 and 1966, Cerpac provided all the millwork and plywood portions of these housing projects. (T15-16; Rich 12) Edward Cervi, the president of Cerpac, had a close personal and working relationship with Rich, its officers and personnel. (T15-16, Rich 5, 6, 18; R440) Through a wholly owned subsidiary, Winter Realty, the principals of Rich held a substantial voting interest in Cerpac stock related to financing the company and were completely familiar with its operations and financial condition (Rich 4, 6; R440) and during a sub-

*The Reporter's Transcript of testimony at trial will be abbreviated "T". The testimony of Frank Rich, Jr., given in the immediately preceding trial of a companion case and admitted in evidence in this case by stipulation (T33-34), will be abbreviated "Rich". The deposition of Edward Cervi, admitted in evidence in this case by stipulation (T16, 35) will be abbreviated "C". The Clerk's Record (Pleadings) will be abbreviated "R".

stantial period of time supplied Cerpac's working capital. (Rich 5-6)

On October 18, 1965, Rich contracted with the United States to build 337 family housing units at Beale Air Force Base. (R384, 441; T14) Transamerica was the surety which provided the payment bond required under the Miller Act, 40 U.S.C. Sec. 270a, for the project. (T14; R384, 388, 441) As in the past, Rich awarded Cerpac two contracts for substantial portions of the work at Beale. One contract, dated February 8, 1966, covered all the required custom millwork and the other contract, dated March 7, 1966, covered all the exterior plywood. (T14, R384, 441) In the words of Frank Rich, Jr., president of Rich, referring to Cervi in testimony at trial:

> "He was awarded the millwork subcontract and the plywood subcontract." (Rich 9)

Both Cerpac contracts incorporated by reference specific portions of the prime contract between Rich and the government (Rich 9; R384, 441) and were similar to those used by Rich and Cerpac on federal projects throughout the period. (Rich 11;T15-16) In addition to the millwork which included all exterior doors, Cerpac was to furnish 324,000 square feet of ½" and 324,000 square feet of ⅝" exterior plywood at a fixed price. (R384; T14-15)

On February 22, 1966, Cervi placed a single order with Industrial, designating the order "Beale 647", and covering all the exterior plywood required by Rich at Beale Air Force Base. (R395) Industrial, a "desk broker" which purchases wood products and material from producing mills for resale (T38; R439), acknowledged the complete Cerpac order at a fixed price on February 24, 1966. (T38; R439)

The Order "Beale 647" required schedule shipments by truck to Rich at Beale Air Force Base. Industrial ordered all the ½" plywood from Diamond National Plywood, and all the 5/8" plywood from Clear Fir Sales Co. These two mill orders were each referenced "Beale 647", and the respective mills were also assigned Industrial numbers E278 through E286 for ½" plywood and E288 through E297 for 5/8" plywood. Each of the numbers assigned, to be used as necessary, represented one truckload of plywood under "Beale 647". (R442-443; T20-27)

The shipments to Rich at Beale Air Force Base started approximately March 10, 1966. (R443) As each truck arrived at Beale Air Force Base, a receipt was executed for the delivery by a Rich representative on the site, showing the truckload quantity and naming Industrial as the source. (R393(a), 443)

Shortly after the shipments started, Rich told Cervi of the need for more plywood at one of their government housing projects located in Charleston, South Carolina, where Rich and Cerpac had the same arrangement as at Beale Air Force Base. (C33; R389-390) Because the market price was high at the time and, as Cervi testified, because "we had the material at Beale already covered . . . we took some of the plywood from Beale and shipped it down there." (T110;C33, Lines 10-13, 15-16) Cervi advised Industrial of the necessary diversion and, on March 14, 1966, Industrial obtained approval from the mill and effected the change of destination under "Beale 647" pursuant to Cervi's explanation and instructions. (T45-46) Two truckloads of plywood were then delivered to Rich under "Beale 647" (T11) at a Charleston freight station in Inness, South Carolina. (R444) The shipment was in-

voiced "Beale 647" to Cerpac after delivery in late March, 1966, at a price unchanged from that under the single "Beale 647" order except for additional freight charges. (T28-29, 58) No change in quantity occurred on "Beale 647" due to the Charleston shipment, and deliveries continued to Rich at Beale. (R384, 441; T14)

During April and May, 1966, Cerpac fell behind in payments to Industrial for plywood shipments to Rich under "Beale 647". (R444; T47, 72) Some payments were received by Industrial and applied to Cerpac's account, but Cervi was told that Industrial would not deliver the two final truckload shipments under "Beale 647" until satisfactory assurance of payment was given or the account brought current. (R444-445; T17-20, 73) Conforming to a "procedure" used by Rich and Cerpac "on other jobs" with other suppliers (C45-47), Cervi told Industrial that invoices for the last two shipments under "Beale 647" could be sent directly to Rich for payment with the approval of Rich (R444-445; T49, 74, 75) and with Cerpac to receive its customary profit as a commission from Industrial. (T58, 77) No new purchase orders were used in connection with the final truckloads and the order designation remained "Beale 647". The last two deliveries to Rich at Beale were made on May 16, 1966, and June 23, 1966, respectively. (R445)

Industrial invoiced the two final shipments directly to Rich, with copies to Cerpac, (R445, T49) under "Beale 647" on June 10, 1966, and June 28, 1966, respectively. (R445) As was the case with all Industrial invoices, the final two invoices sent directly to Rich were payable in full within 30 days with interest at the annual rate of 8% after

the due date, allowing a 2% price discount for payment within 20 days. (R449) The price to Rich on the last two truckloads was the same price that Rich had originally agreed to with Cerpac. (R384, 441; T14, 49, 76)

In addition to all of the plywood delivered under "Beale 647", Industrial also provided Rich with all of the exterior doors for the project at Beale Air Force Base under the following circumstances. (R446) As early as March, 1966, Cervi and Industrial had discussed the need for exterior doors at Beale Air Force Base, and Industrial had submitted a price quotation and samples. (T48-49) But by May, 1966, when Cervi sought to order the doors, Industrial took the same position as it had with respect to the plywood shipments under "Beale 647" on which payments were delinquent, and refused to deliver doors until satisfactory payment could be assured. (T50, R446) Cervi then suggested the same procedure whereby Industrial would invoice Rich directly for doors, stating Rich had approved. (T50) The doors were deleted from Cerpac's millwork contract by change order (Rich 13; R446) and Rich forwarded to Industrial a Contract Agreement for the doors, bearing a date of June 27, 1966, one day prior to the date of the last plywood invoice under "Beale 647"; this Contract Agreement was signed and returned by Industrial on June 30, 1966. (T14, 24; R446)

On "Beale 647", the direct invoices to Rich dated June 10, 1966, and June 28, 1966, covering the last two plywood shipments were not paid within the 30 day discount period. Industrial therefore contacted both Cerpac and Rich, including Frank Rich, Jr., on several occasions concerning the delinquency. (R447; T54, 75, 85) Despite the approved

direct invoicing procedure, Rich refused to pay for all of the "Beale 647" plywood which had been delivered; instead, Rich asked Industrial to drop the Miller Act claim it had made on all unpaid plywood shipments in return for payment on the last two deliveries. (T55) Industrial, then, refused to ship the doors despite the Contract Agreement. (R446; T54, 55) The last plywood delivery to Rich at Beale Air Force Base under the order "Beale 647" had been made on June 23, 1966. On July 13, 1966, Industrial had formally notified Rich in writing of all nine (9) unpaid plywood invoices and the balance due under "Beale 647", by certified mail which Rich had received July 15, 1966. (R386, 447-449; T17-18, 85)

Rich and Industrial subsequently worked out an arrangement for payment for doors using a domestic letter of credit (T55), and Cerpac filed bankruptcy in October, 1966. (T85-86) The Complaint in this action was filed by Industrial on March 13, 1967.

ARGUMENT

Cerpac As Subcontractor

(a) *Subcontractor Status Not Necessary.*

Under the Miller Act, only when there is "no contractual relationship expressed or *implied* with the contractor furnishing [the] payment bond," is it required that one dealing with a subcontractor give notice of his claim within ninety (90) days after supplying the last of the material. 40 U.S.C. 270b(a) The direct relationship itself furnishes the prime contractor with the necessary information required by the statute, and a practical means of self protection concerning unpaid materialman claims. *MacEvoy v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1943); *U.S. ex rel.*

Foley & Bro. Inc. v. U.S. Fidelity & Guaranty Co., 113 F.2d 888, 890 (2nd Cir., 1940).

In this case, based upon all the circumstances shown by the evidence, the District Court found that an implied contractual relationship arose between Rich and Industrial (R455); this finding is not clearly erroneous. Rule 52(a), Fed. Rules Civ. Pro. Standing alone, this implied relationship disposes of the first two issues raised by Petitioners concerning the status of Cerpac as a subcontractor and the timeliness of notice to Rich.

This Court has recognized and defined implied contracts as "such as arise by legal inference and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract." *McDonald v. Thomson*, 184 U.S. 71, 74 (1902); *U.S. ex rel. Hargis v. Maryland Casualty Co.*, 64 Fed. Supp. 522, 527 (D.C. Cal., 1946). In *Hargis, supra*, the application of four distinct but related legal theories (implied contract, third party beneficiary contract, estoppel, and actual notice) to the factual pattern there presented supported the conclusion that notice was not needed when the conduct of the parties demonstrated that the prime contractor had entered into a direct contractual relationship with the use plaintiff in a Miller Act case.

In this case Rich has conceded direct contractual liability to Industrial for the last two shipments of plywood under "Beale 647". Rich insists, however, that its approval of direct invoicing is limited to only these last two shipments. The District Court took a broader view of the relationship which had developed between the parties; in the view of the trial judge, the acceptable evidence showed

Rich had orally approved direct invoicing at the time because Rich knew Industrial would not complete deliveries under "Beale 647" unless paid for all of the order, including pre-existing delinquencies. The "procedure" Rich and Cerpac had used on other federal projects was relied on by Industrial, and the final deliveries were made and accepted by Rich at Beale Air Force Base. Similarly, Rich knew that Industrial was not going to perform under the direct Contract Agreement for exterior doors at Beale Air Force Base, because of the delinquencies under "Beale 647", at the time Rich demanded that Industrial give up its Miller Act claim for all unpaid plywood invoices in order to collect for the last two deliveries.

Respondent respectfully submits that, when Industrial sent its final plywood invoice to Rich, dated June 28, 1966, and two days later returned the executed Contract Agreement for doors, the overt conduct of the parties and timing of events, in the light of all the testimony found creditable, demonstrates and justifies the legal inference that an implied contract for the entire balance due on "Beale 647" had come into existence and that the parties intended to make such a contract. Here Rich not only knew that all of the plywood had been delivered in good faith and receipted for, but through all negotiations from the time direct invoicing was approved, through the period that Industrial refused to perform on the Contract Agreement for doors, Rich had all the details of the unpaid claim of Respondent. The contemporaneous conduct and knowledge of the parties, and the actions of Rich and Industrial with respect to both plywood and doors, made any additional notice unnecessary.

(b) *Cerpac Was a Subcontractor.*

In *MacEvoy v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1943), this Court defined a "subcontractor" for purposes of the Miller Act as follows, at 322 U.S., p. 109:

> ". . . as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a *specific part* of the labor or *material requirements* of the original contract, thus excluding ordinary laborers and materialman." (emphasis added)

The Petitioners argue, however, that no acceptable definition exists and that a subcontractor should be limited to one who does "customized" work because this word was used in *U.S. ex rel. Bryant v. Lembke Construction Co.*, 370 F.2d 293, 296 (10th Cir., 1966) and Petitioner believes it can be understood in the trade.

In *Lembke*, however, the decision turned not upon "customized" material but upon the conclusion that, at 370 F.2d 293:

> "There was by this undertaking no *substantial delegation of any portion* of [the prime] contract." (emphasis supplied)

In *Lembke*, the Court referred to *Basich Brothers Construction Company v. United States*, 159 F.2d 182 (9th Cir., 1946) as a case showing that a supplier of "customized" material was a subcontractor. *Lembke, supra*, p. 295 note 6. The appellate court in this case accurately determined the focal point of its decision in *Basich* when stating that the "distinction between subcontractors and materialmen turns on the substantially and importance of the relation between the middle party and the prime contractor." *U.S. ex rel. Industrial Lumber Co. v. Rich*, 473 F.2d 720,

723 (9th Cir., 1973); citing: *Basich, supra; Lembke, supra;* and *Aetna Cas. & Sur. Co. v. U.S. ex rel. Gibson Steel Co.*, 382 F.2d 615, 617 (5th Cir., 1967).

The relationship between Cerpac and Rich was hardly "typical". The District Court and the Appellate Court were "correct in looking at the total picture here". *U.S. ex rel. Wellman Engineering Co. v. M.S.I. Corp.*, 350 F.2d 285, 286 (2nd Cir., 1965). Limitation of the definition of "subcontractor" to on-site performers is not appropriate under the Miller Act (id.; *MacEvoy, supra*) nor is "customized" work or material a satisfactory test by itself. Cerpac was working to specifications of the prime contract, was actively engaged in the course of the work and received progress payments under what the president of Rich himself understood and characterized as "the millwork subcontract" and "the plywood subcontract". His understanding should represent fairly the understanding of the building trades. Both the millwork and the plywood contracts specifically referred to the millwork and other items to be supplied in accordance with the Plans and Specfications, Section 4 of the government contract entitled "carpentry and millwork". Cerpac took over a substantial "part of the prime contract itself." Compare: *Traveler's Indemnity Co. v. U.S. ex rel. Western Steel Co.*, 362 F.2d 896 (9th Cir., 1966) Rich could have easily protected itself against loss by requiring Cerpac to give security for payment of those contracting with Cerpac. *MacEvoy, supra.*

The basic practical premise supporting the requirement that a Miller Act payment bond recovery be limited to those who, lacking a contractual relation with the prime contractor, deal with a "subcontractor", is that the sub-

contractors will be relatively few in number and well known to the prime contractor. *MacEvoy, supra*, at 322 U.S. 110. The prime contractor can then easily protect himself against claims concerning which he has no knowledge, by requiring bond security or other protection from these relatively few subcontractors.

Between 1963 and 1966, on a substantial number of government housing projects of Rich from Florida to Alaska valued in excess of fifty million dollars, Cerpac exclusively performed all the millwork manufacturing and plywood portions of the contracts between Rich and the federal government. In all Rich government contracts Cerpac was one of the well known few, and probably better known than most. Cerpac was indirectly financed by, and, for a time, controlled by principals of Rich. In no sense was Cerpac, or Cervi, an "ordinary laborer or materialman" so far as Rich was concerned. Having taken from Rich and performed specific and substantial parts of the original contract for Beale Air Force Base, Cerpac was a subcontractor for purposes of the Miller Act in this instance.

If Required, Notice Was Timely

For purposes of starting the 90 day period in which notice must be given under the Miller Act, 40 U.S.C. 270b, Rich and Transamerica would extract the last two deliveries by Industrial from the original order, "Beale 647", from Industrial's performance under that order by conceding a "direct contract" as to these final deliveries. The final shipments were delivered to Beale on May 16, 1966, and on June 23, 1966. Receipt of formal notice, July 15, 1966, is admitted and there is no contention the final de-

liveries were a sham for purposes of extending the notice period, only that an "entirely new relationship" is conceded to have been in existence at least as early as the next to last delivery on May 16, 1966. The final deliveries were integral components of the original contract, *U.S. ex rel. Austin v. Western Electric Co.*, 337 F.2d 568, 572 (9th Cir., 1964); *U.S. ex rel. General Electric Co. v. Gunnar I. Johnson, Inc.*, 310 F.2d 899 (8th Cir., 1962).

The contract was not completed until June 23, 1966, at which time the last delivery occurred, establishing the critical date from which to measure the notice period. *U.S. ex rel. Noland v. Andrews*, 406 F.2d 790 (4th Cir., 1969). As found by the District Court under the evidence, the implied contract was in existence between Rich and Industrial, but nothing limits that contract to the last two shipments or erases "Beale 647" as a whole. Industrial, in good faith, performed the original order, relying on the binding assurances of Rich, directly and through Cervi, that it would be paid for the material subject to the order. The exact type and amount of material required under the original order was delivered to Rich, at the same price Rich had always paid. Promptly after the order was finally filled, Industrial looked directly to Rich for payment and gave formal notice under the Miller Act when payment was not forthcoming.

The record demonstrates Industrial performed the one contract it had to deliver material and notified Rich within ninety (90) days of the last delivery; nothing more is required for recovery on the payment bond. *U.S. ex rel. Austin v. Western Electric Co., supra; U.S. ex rel. General Electric v. Hershson Co.*, 52 F. Supp. 832 (D.C. N.Y.,

1943) The assurances by Rich that Industrial would be paid resulted in a new relationship only in the sense that Rich voluntarily and for its necessary purposes incurred an obligation to pay Industrial for *all material* subject to the original order because Industrial would not otherwise deliver the balance of the order.

Unlike the situation in *U.S. ex rel. Munroe v. Praught*, 270 F.2d 235 (1st Cir., 1959) relied on by Petitioners, Industrial knew at the outset that the materials were to be used by Rich at Beale Air Force Base and looked to Rich for payment as early as May, 1966, when direct invoicing was approved and long before Cerpac filed bankruptcy in October, 1966. No different work or performance was expected or accomplished by Industrial; Rich was aware of and approved Industrial's precise involvement and performance. See, *T. F. Scholes, Inc. v. U.S. ex rel. Moore Equipment Co.*, 295 F.2d 366 (10th Cir., 1961)

Venue Was Proper

The Appellate Court in this case partially reversed the District Court so as to limit the award to Industrial against Transamerica to the amount due on "Beale 647", after deducting the stipulated price of the two shipments Rich diverted to its South Carolina project. As the payment bond surety for the project at Beale Air Force Base, Transamerica was held "liable only for the material supplied in connection with the bonded project." *U.S. ex rel. Carter-Schneider-Nelson, Inc. v. Campbell*, 293 F.2d 816, 818 (9th Cir., 1961), *cert. denied*, 386 U.S. 987. The Judgment on remand was so reduced with respect to Transamerica, therefore, only Rich can complain. As pointed out in the opinion of the Court of Appeals, the considerations affect-

ing the liability of Rich for the South Carolina shipments are quite different from those affecting the surety on a Miller Act payment bond.

The Miller Act requires that recovery on the payment *bond* be had by suit in the federal district "in which the contract was to be performed and executed." 40 U.S.C. 270b (b) This has frequently been construed as a venue provision. See: *U.S. ex rel. Capolino Sons, Inc. v. Electronic and Missile Facilities, Inc.*, 364 F.2d 705 (2nd Cir. 1966) *cert. dismissed*, 385 U.S. 924, and cases cited at p. 707.

No more is necessary to recovery against Rich for the South Carolina shipment than the contractual liability established in the record. The record shows Cervi's instructions concerning the partial diversion, although relayed to the mill through Industrial, did not alter the substantive validity of "Beale 647" in any material respect: parties, price, type, quantity and quality all remained the same so far as Rich is concerned. So did the site of performance of the original contract for purposes of the Miller Act; it would be manifestly unfair to defeat Industrial's claim because some of the material already ordered was diverted for the convenience of both Rich and Cerpac to use on another of their government projects. See: *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527, 529 (5th Cir., 1946)

Even if the two invoices for the shipment to Inness, South Carolina could properly be the basis for an action by Industrial against Rich in that federal district, the circuity of actions and expense which would result from imposing this limitation absolutely in this case would defeat the intent and purpose of Rule 42(a), Federal Rules of Civil

Procedure, and the liberal remedial purpose of the Miller Act. No evidence was introduced at trial in opposition to the substantive merit of this portion of Industrial's claim, and Rich stipulated the material was received in South Carolina and used on its government contract in Charleston. The District Court had jurisdiction of the case. *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 53 L.Ed. 753 (1909); Wright, *Federal Courts*, Sec. 19, p. 55 (1963). Rich has suffered no prejudice as a result of having this portion of the claim determined by the federal court for the Eastern District of California. Separate trials against the same prime contractor, and the additional time and expense for the litigants and the federal courts, should not be required.

Interest Was Properly Awarded After Revision on Appeal

All Industrial invoices under "Beale 647" provided for interest at the rate of 8% per annum from their respective due dates. The invoices each were due 30 days after their respective dates, at which time the interest commenced at the stated rate. The amount due and date of each invoice was finally stipulated by the parties at trial; the data is assembled and included in the trial court findings.

In an action by the supplier of a subcontractor under the Miller Act, liability for interest is governed by the subcontractor's obligation to the supplier. *L&E Co. v. U.S. ex rel. Kaiser Gypsum*, 351 F.2d 880, 883 (9th Cir., 1965) Under the Act there is no express provision for interest, so California law supplies the rule. *L&E Co., supra*, p. 883, citing *U.S. ex rel. Carter-Schneider-Nelso Inc. v. Campbell*, 293 F.2d 816 (9th Cir., 1961) By state statute, California Civil Code Sec. 3287, interest is recoverable from the due

date if the damages are "certain, or capable of being made certain, by calculation." In California, any legal rate of interest stipulated by contract is chargeable after a breach thereof. Calif. Civil Code Sec. 3289

While the District Court originally awarded statutory interest under California Civil Code Sec. 3287(b), as interest on an unliquidated claim, computed from the date the Complaint was filed, Industrial's claim was liquidated, and the District Court should have included in the Judgment the contract rate of interest of 8% per annum from the dates the respective Industrial invoices were due. The Appellate Court properly required this revision and it was incorporated in the Judgment on remand. See: *Atlantic Electric, Inc. v. Allis-Chalmers Manufacturing Co.*, 375 F.2d 726 (5th Cir., 1967); *Aetna Casualty and Security Co. v. U.S. ex rel. R. Studer & Sons*, 365 F.2d (8th Cir., 1966)

Attorneys' Fees Were Properly Awarded

The District Court in this case specifically found that: "A reasonable and necessary fee, were one to be awarded, is 25% of the plaintiff's recovery of principal and interest, which sum would be added to plaintiff's Judgment, if awarded." The District Court then ruled that such fees should not be awarded. The Court of Appeals reversed on this point and remanded the matter to the District Court for further consideration, holding that such fees "are definitely to be awarded" (473 F.2d at 278) and expressing no opinion about the amount or calculation of the fee, leaving this for the determination of the District Court. The District Court on remand then reaffirmed its original conclusion that a 25% attorney fee was reasonable and

necessary for services through trial, added a fee of $3,500.00 for services on appeal, and incorporated the award of attorneys' fees in the Judgment against Petitioners. Respondent respectfully submits the award of attorneys' fees was, in all respects, proper.

By its express statutory language, the Miller Act is not limited to payment of the invoice price of labor and materials furnished under a government construction contract. The Act is designed "for the *protection* of all persons supplying labor and material" in connection with a federal project. (emphasis supplied) 40 U.S.C. Sec. 270a(a) (2). The Act is, as it should be, construed liberally so that the Congressional intent and purpose to provide such "protection" may be effected. *Illinois Sur. Co. v. The John Davis Co.*, 244 U.S. 376, 380 (1917) (Brandeis, J.) When the protection of the Act is invoked, the claimant is, in the wording of the statute, entitled to "prosecute said action to final execution and judgment for the sum or sums justly due him . . ." 40 USC Sec. 270b(a).

The protection afforded by the Act expressly contemplates payment of "the sums justly due". Congress could have but did not detail explicitly each specific element to be included in a computation of "the sums justly due". For example, the Lanham Act (15 USC Sec. 1117) itemizes each of the components of the remedy afforded thereunder. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967). But the fact Congress did not detail in the Miller Act the components of the remedy or the elements to be included in "the sums justly due," does not preclude the federal courts from doing so, in line with the express purpose of the Act, nor prevent the federal courts

from referring to state law to determine the appropriate elements of a Miller Act recovery in a particular state.

The state law referred to by the Ninth Circuit in this case was the California statute permitting the recovery of attorneys' fees in state court actions on the bonds of public work contractors (state and local government projects). Under California Government Code, Sec. 4207, the California legislature has provided as follows:

> "Upon the trial of the action, the Court shall award to the prevailing party a reasonable attorneys' fee to be taxed as costs, and to be included in the judgment therein rendered."

The California District Courts of Appeals, in *B. C. Richter Constr. Co. v. Continental Cas. Co.*, 230 Cal. App. 2d 491, 506, 41 Cal. Rptr. 98 (1964), had examined this provision and held that Government Code, Sec. 4207 had no application "to projects of the United States." 230 Cal. App. 2d, at 506. Petitioners urge that the California court has therefore decided what "the sums justly due" should be in an action brought in federal court under a federal statute enacted by Congress. This contention is erroneous. The same proposition was closely examined and rejected in *U.S. ex rel. Chevron Asphalt Co. v. Maryland Casualty Company*, 316 F. Supp. 750, 751 (E.D. Cal. 1970) (MacBride, C.J.); the legal discussion of Judge MacBride was expressly approved in the appellate decision of the instant case.

The analysis of Judge MacBride in *Chevron Asphalt, supra*, points out that attorneys' fees as part of the claim a Miller Act case must represent part of the federal statutory right created by Congress. The claim does not originate in either common law or the statute of any particular state. When making its determination of the sums justly due un-

der the federal law, the federal court should appropriately look to the purpose of the Miller Act. Because the Miller Act is the federal equivalent of state lien laws, the remedy in federal court is properly composed of the same elements as would be available to lien claimants in a state court collecting for labor and material furnished on non-federal projects. One of the elements permitted in the state court on government projects in California is attorneys' fees. Another of the statutory elements is the rate of interest allowed on a claim, dependent upon its status as a liquidated or an unliquidated amount due. These elements are derived from state legislation in California and express the state policy with respect to the remedy which should be available to an unpaid laborer or materialman. In this posture, there is no reason to differentiate between a claimant whose remedy is derived from a federal statute and a claimant whose remedy is derived from a state statute, when the federal remedy was intended to be the equivalent of the state remedy. *Illinois Sur. Co. v. John Davis Co., supra; Transamerica Insurance Company v. Red Top Metal, Inc.*, 384 F.2d 752 (5th Cir., 1967), and see, *U.S. ex rel. Walker & Co. v. Home Indemnity Co.*, 346 F. Supp. (D.C. Tex., 1972)

The decision by the Ninth Circuit in *U.S. ex rel. Getz Bros. & Co. v. Markowitz Bros. (Delaware) Inc.*, 383 F.2d 595 (9th Cir., 1967) does not conflict with the present decision by that court, nor stand for the proposition urged by Petitioners. The local law of Guam simply did not permit an award of attorneys' fees. Under the local statute relied on, a payment bond surety was not subject to the statutory liability of an insurer for attorneys' fees. *Markowitz, supra*, p. 598-599

The opinion of the District Court in *U.S. ex rel. Bartells Company v. Hoffman Construction Co.*, 163 F. Supp. 296 (E.D. Wash., 1958) is a clear expression of the view that a state statute allowing a reasonable attorneys' fee to the successful claimant in a lien foreclosure on a non-federal project is of no avail to a successful Miller Act claimant. The decision predates that of the Court of Appeals for that District in this case, and is contrary to the better view and weight of authority since developed on the point. See, e.g., *Transamerica Ins. Co. v. Red Top Metal, Inc., supra; U.S. ex rel. Pritchard Products Corp. v. Fullerton Constr. Co.*, 407 F.2d 1002 (4th Cir., 1969); *United States Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir., 1968), *cert. denied* 383 U.S. 978, 21 L.Ed. 2d 439; *D&L Constr. Co. v. Triangle Electric Supply Co.*, 322 F.2d 1009 (8th Cir., 1964); *U.S. ex rel. Dixie Plumbing Supply Co. v. Taylor*, 293 F.2d 717 (5th Cir., 1961); *U.S. ex rel. Sanford v. Continental Casualty Co.*, 293 F.Supp. 816 (D.C. Miss. 1968).

As a federal remedial statute (an enactment made "in lieu of the lien . . . customary where property is owned by private persons," *Illinois Sur. Co., supra*, at 244 U.S. p. 380) the protection available under the Miller Act for federal projects should be equal to the customary protection afforded those who can invoke the state created remedy for non-federal projects. Had Congress detailed the elements of "the sums justly due" under the Miller Act to expressly include attorneys' fees, the result would unjustly favor federal claimants over state claimants where state law customarily does not permit attorneys' fees. The parity of the claimants in each state should be preserved by this Court.

CONCLUSION

Respondent respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit with respect to each issue raised by the Petitioners herein should be affirmed.

Respectfully submitted,

GORDON, THOMAS,
HONEYWELL, MALANCA,
PETERSON, O'HERN
& JOHNSON

E. M. MURRAY
DALE L. CARLISLE
DENNIS S. HARLOWE
Attorneys for Respondent